

Birthright Citizenship and the 14th Amendment

Opponents of illegal immigration cannot claim to champion the rule of law and then propose policies that violate our Constitution.

By James C. Ho



A coalition of state legislators, motivated by concerns about illegal immigration, is expected to endorse state-level legislation today at the National Press Club in Washington, D.C., to deny the privileges of U.S. citizenship to the U.S.-born children of undocumented persons.

This effort to rewrite U.S. citizenship law from state to state is unconstitutional—and curious. Opponents of illegal immigration cannot claim to champion the rule of law and then, in the same breath, propose policies that violate our Constitution.

In the aftermath of the Civil War, members of the 39th Congress proposed amending the Constitution to reverse the Supreme Court's notorious 1857 *Dred Scott v. Sandford* ruling denying citizenship to slaves. The result is the first sentence of the 14th Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

The plain meaning of this language is clear. A foreign national living in the United States is "subject to the jurisdiction thereof" because he is legally required to obey U.S. law. (By contrast, a foreign diplomat who travels here on behalf of a foreign sovereign enjoys diplomatic immunity from—and thus is not subject to the jurisdiction of—U.S. law.)

During congressional debates, both proponents and opponents of the citizenship clause agreed with this interpretation of the 14th Amendment. For example, Pennsylvania Sen. Edgar Cowan opposed the clause precisely because it would extend birthright citizenship to the U.S.-born children of Chinese laborers and other noncitizens who "owe [the U.S.] no allegiance [and] who pretend to owe none."

Tellingly, Cowan's racially charged opposition was met with the following response from California Sen. John Conness: "The proposition before us . . . relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. . . . I am in favor of doing so. . . . We are entirely ready to accept the provision proposed in this constitutional amendment."

Supreme Court precedent further reinforces this view of the 14th Amendment. In 1898, the court held that a U.S.-born child of Chinese immigrants was entitled to citizenship. In *United States v. Wong Kim Ark*, it held that the "14th Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory . . . including all children here born of resident aliens."

The court reiterated this view in *Plyler v. Doe* (1982). The majority held—and the dissent agreed—that the 14th Amendment extends to anyone "who is subject to the laws of a state," including the U.S.-born children of illegal aliens. Likewise, in *INS v. Rios-Pineda* (1985), the court again unanimously agreed that a child born to an undocumented immigrant was in fact a U.S. citizen.

Opponents of birthright citizenship say that they want nothing more than a chance to relitigate the meaning of the 14th Amendment. But if that is so, state legislation is a poor strategy.

Determining U.S. citizenship is the unique province of the federal government. It does not take a constitutional expert to appreciate that we cannot have 50 different state laws governing who is a U.S. citizen. As a result, courts may very well strike down these state laws without even invoking the 14th Amendment. The entire enterprise appears doomed to failure.

Many Americans have sincere concerns about the rule of law. But there are many tools available to combat illegal immigration. Surely we can do so without wasting taxpayer funds on a losing court battle, reopening the scars of the Civil War, and offending our Constitution and the rule of law.

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